

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON  
TRANSCRIPT OF PROCEEDINGS

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IN RE: ETHICON, INC., PELVIC REPAIR MDL NO.  
SYSTEM PRODUCTS LIABILITY LITIGATION 2:12-MD-2327

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TELEPHONIC STATUS CONFERENCE

October 15, 2013

**BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE**

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P R O C E E D I N G S

THE CLERK: Hi, everyone. This is Laura, Judge Eifert's assistant. Lisa Cook will be the court reporter today. And, if you would, please identify plaintiffs' counsel and then defense counsel for me.

MR. AYLSTOCK: Laura, this is Bryan Aylstock on behalf of the plaintiffs.

MS. BAGGETT: Renee Baggett on behalf of the plaintiffs.

MR. CARTMELL: Tom Cartmell on behalf of the plaintiffs.

MR. ANDERSON: Ben Anderson on behalf of the plaintiffs.

MR. WALKER: Eric Walker on behalf of the plaintiffs.

THE CLERK: I'm sorry. I didn't get the name after Ben Anderson.

MR. WALKER: Eric Walker.

THE CLERK: Okay. Thank you.

MR. WALKER: Thank you.

MR. FAES: Andy Faes on behalf of the plaintiffs.

THE CLERK: I'm sorry. Could you repeat that?

MR. FAES: Andy Faes, F-a-e-s.

THE CLERK: All right. Thank you. Anyone else for the plaintiffs?

1 (No Response)

2 THE CLERK: That must be it. I think that's it.  
3 Thank you.

4 How about for defense counsel, please.

5 MR. GAGE: William Gage and Donna Jacobs.

6 THE CLERK: All right. Anyone else for defense?

7 MR. THOMAS: David Thomas, Your Honor.

8 THE CLERK: All right.

9 MR. RUBIN: And Gary Rubin.

10 THE CLERK: Okay. Thank you, everyone. If you'll  
11 hold one moment for the Judge.

12 THE COURT: Hello.

13 Hey, it sounds like somebody's a little bit close to  
14 the speaker. I'm getting some feedback, but I can't tell  
15 where it's coming from. So, could we all sit back just a,  
16 just a smidgen. Thank you.

17 All right. Well, have you-all settled all these cases  
18 in the last week?

19 MR. AYLSTOCK: Well, -- Your Honor, this is Bryan  
20 Aylstock. Not exactly. We, we did have a meet-and-confer  
21 this morning and made some progress on certain issues, but  
22 settlement might be a stretch.

23 THE COURT: Okay. Well, I don't have anything on  
24 the agenda myself for today. To be honest with you, I  
25 didn't look at the last transcript yet to see if there was

1 anything left over. But who would like to go first?

2 MR. AYLSTOCK: I will, Your Honor. This is Bryan  
3 Aylstock.

4 One of the subjects of our meet-and-confer and a major  
5 focus of our hearing last week was the -- I guess the week  
6 before last was the Klinge/Klosterhalfen issue.

7 THE COURT: Yes.

8 MR. AYLSTOCK: And I have some news, I guess, to  
9 report, some good news. We do have a -- I'm sorry. I'm out  
10 of breath. I'm up on a mountain. But the good news is --  
11 which, by the way, I may have to drop off and -- if  
12 reception gets bad.

13 But the good news is that we have, we have made contact  
14 with both those witnesses. As the Court will recall,  
15 Dr. Klosterhalfen is a non-retained fact witness. But we  
16 did make a disclosure yesterday, pursuant to the expert  
17 report deadline, simply as a fact witness because he  
18 obviously is one of the foremost experts in the world on  
19 mesh. So, I think that distinction is important.

20 But, in any event, both of these witnesses have agreed  
21 to comply with the *duces tecum*. When the depo notices were  
22 issued by Ethicon on both these witnesses, they issued *duces*  
23 *tecum* notices. And although they're German and subject to  
24 German law within the framework of that law and, in  
25 particular, the privacy concerns, they're willing and have

1 actually collected, to the extent where they know where it  
2 is on their computers, the documents that would be  
3 responsive to that, again considering the privacy of, of the  
4 patients and so forth under German law. So, there is that  
5 issue.

6 And there's also an issue, as the Court knows, with  
7 regard to Ethicon's production of the Klinge/Klosterhalfen  
8 documents. And we -- I received a letter a couple of days  
9 ago that William -- Mr. Gage forwarded to me from another  
10 lawyer, another Ethicon lawyer that indicated that they have  
11 located a number of Klinge and Klosterhalfen documents, some  
12 of them related to hernia. And their idea was to produce it  
13 within the next 45 days.

14 That's problematic for us because we're traveling, at  
15 least some of us -- Mr. Anderson and some of us on the call  
16 are going to be traveling to do their depositions in the  
17 next two to three weeks.

18 And, so, our thought was that both sides would, would  
19 produce all the Klinge/Klosterhalfen documents in their  
20 possession, and do it within the next ten days, so that both  
21 sides with have an opportunity to review them and be ready  
22 for their deposition, and, and basically certify  
23 completeness of that production.

24 There is an issue outstanding, however, on the manner  
25 of the production, not the documents themselves. Again,

1 we're -- our -- these witnesses are willing to produce the  
2 documents in hard copy format pursuant to the *subpoena duces*  
3 *tecum*. But the big issue right now is whether they should  
4 be required to attach some sort of a, a collection kit  
5 which, you know, what I consider to be spyware or some sort  
6 of a -- something to go on their computer and collect  
7 things. And I don't think that's reasonable.

8 It's inconsistent with the ESI protocol in that the ESI  
9 protocol applies to parties, not witnesses. We have done  
10 some third-party production. But for the most part, except  
11 for AdvaMed that's basically a trade coalition of pharma and  
12 medical device companies, the metadata hasn't been produced  
13 or, if it is, it's been very limited.

14 So, our thought was that we would produce, both sides  
15 produce these documents within the next ten days, and then  
16 we'd go over to Germany and hopefully complete these  
17 depositions once and for all.

18 So, that, that's our position on the  
19 Klinge/Klosterhalfen issue. I think we're close, but the  
20 idea of having a third-party witness attach something to his  
21 or her computer and let it search for documents is, I think,  
22 inconsistent with the law.

23 It's also very problematic given the German privacy  
24 laws because there can be criminal penalties attached. And  
25 some of the metadata that might be produced or found, I



1 guess, with this software could contain patient names,  
2 patient information. Even the name of the file itself could  
3 be a patient name. And there would be really no way to deal  
4 with that, no good way, certainly no timely way.

5 And what we thought we could do is with the  
6 Klinge/Klosterhalfen documents have them produce, be  
7 produced simultaneously to Ethicon and us. To the extent  
8 that there are any privilege issues, which I can't imagine  
9 since these are third-party witnesses, there weren't any  
10 attorneys present at any of these, that they could be  
11 subject to some sort of extra clawback or something like  
12 that.

13 But we'd like to get them at the same time that Ethicon  
14 gets them, particularly given that these are consultants,  
15 not, not corporate witnesses, and particularly given the  
16 time frame that we're operating under here.

17 THE COURT: All right. It sounds like you're  
18 scaling the Alps or something there, Mr. Aylstock.

19 UNIDENTIFIED SPEAKER: He's going up three flights  
20 of stairs.

21 MR. AYLSTOCK: Yeah. I've been found out. I'm  
22 sorry.

23 THE COURT: Dr. Klinge, is that, is that doctor  
24 also in Germany? Both of them are in Germany?

25 MR. AYLSTOCK: Yes, Your Honor, both are in

1 Germany.

2 THE COURT: Well, I think fundamentally I couldn't  
3 order them to attach anything to their computers in Germany.  
4 I mean, I, I may think I have a lot of authority, but it's  
5 actually limited when it comes to the borders of the United  
6 States. And -- but I don't, I don't see that as even being  
7 a reasonable, a reasonable issue on the table because it's  
8 not something I could order even if I really wanted to do  
9 that. So, I think we need to remove that.

10 So, if we take that off the table, what I hear you  
11 saying the dispute is at this point is whether it will be 45  
12 days or 10 days for the production and whether the  
13 productions would be simultaneous.

14 MR. GAGE: Your Honor, --

15 MR. AYLSTOCK: That's correct, Your Honor. And I  
16 guess the only thing I would add is we've heard a lot about,  
17 you know, "We're still looking." And I get that. I know  
18 this is a big company and I know they're trying to turn over  
19 every rock.

20 But what we can't have is a document dump the night  
21 before the deposition that so often happens here, or three  
22 weeks after the deposition when we've all spent the time and  
23 money to go to Germany.

24 And, and for that reason, what we'd be looking for is  
25 that, "Okay, we have done everything we reasonably know how

1 to do and this is what we found," not, "We're still looking.  
2 There may be some other places down the road."

3 And, and, and certainly we would do that as well with  
4 Klinge and Klosterhalfen. Whatever they find, you know,  
5 they've done, they've done the reasonable efforts in  
6 compliance with the Federal Rules.

7 THE COURT: All right. Who from the defense wants  
8 to respond?

9 MR. GAGE: Your Honor, this is William Gage. Just  
10 a couple of, of things to, to talk about here.

11 First of all, I think we have to keep in mind that with  
12 regard to the jurisdictional issue, these are witnesses who  
13 are voluntarily choosing to come to the United States and  
14 testify against their former, if you will, employer. They  
15 were consultants. They weren't employees.

16 And the data that we're seeking to get is data that is  
17 limited to their consulting engagements with Ethicon. In  
18 essence, Ethicon is seeking to reclaim what is, in essence,  
19 its own documents.

20 In other words, -- and we're making the request of them  
21 because they're coming to the United States to testify or  
22 they're going to offer testimony in Germany to be offered in  
23 the United States court against Ethicon.

24 So, at that level, Your Honor would clearly have  
25 jurisdiction and authority to say that if they're going to

1     come into your courtroom, they have to comply with X, Y, and  
2     Z with regard to the production of their data.

3             Secondly, with regard to the ESI protocol, Mr. Aylstock  
4     made the comment that it doesn't apply to third parties.  
5     The plaintiffs have issued -- the plaintiffs in the MDL  
6     litigation have issued a number of subpoenas on third  
7     parties, some as of very recently.

8             And in their definition of "document," which is a  
9     defined term in their subpoenas, they very specifically say  
10    that, "What we want from you, third party, is the entire  
11    document in its electronic state, including metadata."

12            So, it, it seems, Judge, that it's difficult for them  
13    to say it doesn't apply when, in fact, they are requesting  
14    it from third parties.

15            THE COURT: Before you go on, let's talk about the  
16    first issue.

17            I am not going to require either of these physicians to  
18    attach anything to their computer. I think it's unfortunate  
19    if Ethicon didn't retain the documents between itself and  
20    its consultant. But I'm certainly not going to ask these  
21    physicians to attach anything, or these -- I don't know if  
22    they're medical doctors or, or Ph.Ds. But I'm not going to  
23    ask them to attach anything to their computer. In my  
24    opinion, that's off the table. So, I don't think we need to  
25    go there any further. All right?

1 MR. GAGE: Understood.

2 THE COURT: Okay. So, your second issue is what  
3 then?

4 MR. GAGE: Well, the second issue would be -- and,  
5 Judge, just to clarify, is, is what Your Honor saying is  
6 that, that they will produce documents by printing them onto  
7 paper? I mean, is that, is that what Your Honor is -- just,  
8 just to clarify.

9 THE COURT: Well, no. What I understood Mr.  
10 Aylstock to say was that you want some collection kit to be  
11 attached to their computer that will essentially scan the  
12 information on their computer and pull out the things that  
13 the kit is set to find. And if that's what you want to do,  
14 then I'm telling you I'm never going to order that.

15 On the flip side, if you want documents from them, I  
16 don't care if they put them all on a disk or if they print  
17 them all out or they put them on a thumb drive or however  
18 they want to -- if they e-mail them to you. It doesn't  
19 matter to me how, in what format they're produced. What I'm  
20 not going to allow is the collection kit.

21 MR. GAGE: I understand.

22 Your Honor, the, the issue is -- and I know this stuff  
23 gets maddingly detailed -- is the metadata. And, I mean, I  
24 know -- you know, I'm not -- I don't pretend to be an ESI  
25 expert. I fortunately have Gary Rubin on the call with us

1 if we get into those issues.

2 But, Judge, the metadata is the information that's --  
3 you know, it's information that's kind of behind the  
4 document, so to speak. So, for example, if you have an  
5 e-mail, there may be a bunch of fields of data that don't  
6 appear on the e-mail, but it indicates things like, you  
7 know, date sent, date received, when it was last revised,  
8 and things of that nature.

9 THE COURT: Uh-huh, right.

10 MR. GAGE: And apparently if you take -- for  
11 example, if Dr. Klosterhalfen had, say, ten Word documents  
12 or ten e-mails, if he just PDF-ed those or if he just  
13 forwards them to, for example, Ben Anderson in their, in  
14 their format that exists on their computer, and then Ben  
15 just flips them over to us either exactly in the form in  
16 which he received them from Dr. Klosterhalfen or perhaps as  
17 a PDF, the metadata gets actually changed, actually -- some  
18 courts call it spoliated. The mechanics of moving the  
19 document from Klosterhalfen to Ben Anderson actually  
20 destroys the metadata.

21 So, what my people are telling me is if we want to get  
22 the metadata, which as I understand what Ethicon produces  
23 with regard to its production under the ESI protocol, if  
24 we're going to preserve the metadata, then we've got to have  
25 some way to have the, the documents moved over to a, a disk

1 or some other format that preserves the metadata.

2 Now, the reason for the collection kit is it's a, it's  
3 a type of a, a stick that gets attached to the computer that  
4 was used, for example, in -- I've been told in the hips,  
5 the, the, the Pinnacle hips implant MDL to collect documents  
6 from third parties.

7 So, the reason that we proposed it was it's been  
8 something that's been used and agreed to, as I understand  
9 it, in other litigations. We just wanted Your Honor to know  
10 where we're coming from.

11 But the -- but our particular collection system is not  
12 really -- I mean, I'm not saying it's going to be a  
13 collection system, and I understand Your Honor's ruling.  
14 I'm just trying to find a way to get the data from the, from  
15 these individuals without losing the metadata.

16 THE COURT: Well, what other, what other options  
17 are there? Can they, can they download things on a disk and  
18 preserve the metadata?

19 MR. GAGE: Your Honor, if I may, I would ask  
20 Mr. Rubin who's on the phone -- he's also one of Ethicon's  
21 lawyers. He's kind of our e-discovery expert and he could  
22 probably answer that better than I could.

23 THE COURT: Okay.

24 MR. RUBIN: Good afternoon, Your Honor.

25 The short answer to Your Honor's question is "no."

1 Preserving the metadata by simply moving a document onto a  
2 disk, as Your Honor mentioned, or e-mailing it, as William  
3 mentioned, that, that's generally not something that happens  
4 with an operating system that an ordinary person uses. It  
5 does require the technological tools of a vendor such as,  
6 such as the vendor that we are using with our own custodians  
7 and, and the vendor who is working with third parties in the  
8 hips litigation, as, as Mr. Gage mentioned.

9 I'll just give Your Honor just, just a quick  
10 hypothetical and then a quick, quick actual example.

11 Consider, Your Honor, that if Dr. -- either of the Drs.  
12 K had an e-mail in his system, the metadata associated with  
13 that e-mail would say the e-mail was sent on X date from so  
14 and so at Ethicon to Dr. K. If Dr. K then forwarded that  
15 e-mail to plaintiffs' counsel, well, the new date of that  
16 e-mail would be October 15th, 2013.

17 And it would then be from Dr. K to plaintiffs' counsel.  
18 And it would no longer have the attributes of the original  
19 e-mail. And there would be less functionality from our end  
20 or, frankly, even from plaintiffs' end for searching for  
21 that e-mail in the database.

22 There is also -- I'll give you an actual example. Dr.  
23 Klinge sent plaintiffs' counsel a couple of weeks ago a  
24 collection of documents, and plaintiffs' counsel turned them  
25 over to us.



1           One of those documents appears to be a March, 2002, PDF  
2 of a PowerPoint. However, -- and I'm looking at the  
3 document right now. When I go to that document's  
4 properties, it says that the author of the document is U.  
5 Klinge and that the created date of the document is  
6 September 30, 2013.

7           That just can't be right, Your Honor. And either that  
8 means that that was the date -- and this is likely -- that  
9 was the date on which Dr. Klinge sent the document, copied  
10 it to disk and sent it to plaintiffs' counsel. But it could  
11 also mean that that is the date on which a document that Dr.  
12 Klinge had had on his hard drive, that is a date on which he  
13 accessed and changed and altered that document.

14           Now, I'm not saying one way or the other. But  
15 obviously Your Honor can see that without the metadata,  
16 without being able to trust what the document is telling us  
17 about itself, then those are questions. That then becomes  
18 an area of exploration that we would have to, have to get  
19 into at the actual deposition.

20           So, the short answer to Your Honor's question is "no,"  
21 and I apologize for taking too much of your time.

22           MR. AYLSTOCK: Your Honor, this is --

23           THE COURT: How can this be done? How can it be  
24 done.

25           MR. AYLSTOCK: I have a proposal, Your Honor. I

1 didn't mean to interrupt.

2 THE COURT: Go ahead.

3 MR. AYLSTOCK: My, my proposal is this. My  
4 understanding is it's -- these, these physicians simply hit  
5 Control P and print out the documents. The metadata isn't  
6 changed with the Control P.

7 To the -- you know, the -- I guess it's important -- I  
8 think Your Honor already hit on it. These aren't -- these  
9 are Ethicon documents. These are documents Ethicon should  
10 already have and know. So, that's point one.

11 But point two is the volume of these is, is not a huge  
12 volume. And if we have the experts print them out, if  
13 there's a question -- you know, in an e-mail it's going to  
14 say what the date of the e-mail is. It's going to say who  
15 it's from, who it's to, who it's cc-ed. That, that's what  
16 matters.

17 We, we print it out. If there's a question, we deal  
18 with it. I mean, we can -- we don't -- we're not opposed  
19 necessarily to producing it. It's just these are  
20 third-party witnesses that are not subject to the ESI  
21 protocol. And that's not what the *duces tecum* normally  
22 requires of these people.

23 If there's an issue, we'll deal with it on a case by  
24 case basis or something like that. But just printing out  
25 the documents and then -- the documents are going to have

1 dates on them. They're going to have the information on it.  
2 And I don't think it -- I think we're -- it's kind of a  
3 tempest in a teapot.

4 THE COURT: So, Mr. Rubin, can they preserve the  
5 metadata and can you see it if it's just printed out?

6 MR. RUBIN: No, Your Honor. The metadata is, is  
7 in what I guess I would call fields surrounding an  
8 electronic document. There's no metadata in a, in a paper  
9 document.

10 THE COURT: Well, if the metadata includes -- if  
11 it includes things like who, who is on, who e-mails are sent  
12 to and who sent the e-mails and the date they were sent,  
13 wouldn't that all show up when you printed out the e-mail?

14 MR. RUBIN: It, it -- not necessarily. Some of it  
15 in an e-mail could show up. There could be hidden users.  
16 There could be attachments that drop out because of the way  
17 they are printed. There could be graphics that drop out.  
18 Sometimes I'm sure Your Honor receives e-mails where  
19 embedded graphics are, are rendered as, as separate  
20 attachments.

21 And then with respect to documents like PDFs,  
22 PowerPoints, and Word documents, no metadata that is  
23 associated with those documents including, for example,  
24 track changes, including, for example, different version  
25 numbers, none of those types of data would be included with

1 a printout.

2 Now, we are not -- we, we offered the third-party  
3 collection kit as a way to cut through this and try to be  
4 easy. Granite is one of Ethicon's vendors on this case and  
5 has been a J&J vendor on other cases. And they do this for  
6 third parties. It doesn't have to be Granite. There are  
7 other vendors, plenty of other vendors who can do something  
8 like this.

9 And as Mr. Gage said, all we are asking is that the  
10 documents be produced as plaintiffs are asking us to produce  
11 documents, as plaintiffs are asking other third parties to  
12 produce documents, and as I think we're entitled to the  
13 documents under the Federal Rules. That's all we're asking.

14 And if, and if plaintiffs would, would prefer to  
15 contact the vendor, and I'd be more than happy to recommend  
16 any of them who are not involved in this case, that would  
17 be -- that, that would work equally well.

18 MR. ANDERSON: Your Honor, this is Ben Anderson.  
19 May I be heard?

20 THE COURT: Sure.

21 MR. ANDERSON: That's not, with all due respect,  
22 all that they're asking.

23 What we have here is the difference between Ethicon  
24 being a large corporation that has their own lawyers, that  
25 have their own ESI vendors that can go through, collect

1 data, look at it for confidentiality reasons. They do a  
2 heavy amount of redaction on their end. And they take 30 or  
3 45 days before they ever produce things, if that.

4 These third-party vendors, the only one that produced  
5 any level of metadata is a very large organization that has  
6 lawyers and ESI departments and everything else.

7 What we are talking about here is asking two German  
8 surgeons to hook up something on their computer. They would  
9 have to -- in order for them to -- of course, they have  
10 great skepticism about having their former employers send  
11 something to them saying, "Hook this up to your home, your  
12 office, and your, your lap-top and then send it back to us  
13 and trust us it's only going to be limited to things that  
14 aren't going to get you in trouble under German law."

15 This Court can't guarantee that. The defendants can't  
16 guarantee that. We can't guarantee that.

17 And when it comes to that, they don't -- they will have  
18 to hire their own lawyers. We have to have confidentiality  
19 protections in place. We're talking about a full-blown  
20 thing.

21 And we have two German doctors who have patient  
22 information and they're concerned about -- they can't  
23 produce patient information, hospital information, surgeon  
24 information.

25 And the problem with metadata is if they just begin to

1 download that, metadata also goes back and it looks like --  
2 it looks at other versions. So, if they have named a file  
3 by a patient name in some earlier version, that wouldn't  
4 show up for them on their computer. They would have to  
5 themselves go through and look at the metadata and determine  
6 whether or not there may be patient information.

7 So, for, for two German doctors whose practices rely  
8 upon them having confidentiality, and for Dr. Klosterhalfen  
9 who runs one of the largest, if not the largest, pathology  
10 institutes, his business reputation is completely on the  
11 line if all the hospitals and surgeons that have been  
12 sending him their explants and, and companies for 25 years  
13 now hear that he is allowing a collection kit to go on his  
14 computer to pull down what could be confidential patient  
15 information.

16 The defendants know that this will have a chilling  
17 effect not only on the experts testifying, but on these  
18 guys' business practices. This is an extraordinary relief  
19 that they're asking for.

20 THE COURT: Well, I've already, I've already told  
21 them they're not going, they're not going to get a  
22 collection kit. I've already made that perfectly clear.  
23 That's not going to happen.

24 MR. ANDERSON: Okay.

25 THE COURT: The, the question I have in my mind is

1 under Rule 45 when you talk about producing electronically  
2 stored information, I'm not certain that it includes  
3 metadata.

4 MR. ANDERSON: Correct.

5 THE COURT: I mean, that -- what it says is that  
6 you produce it in the form that it is ordinarily maintained.

7 Now, I don't know what that means. There's always  
8 metadata somewhere there with any electronically stored  
9 document. But I don't know that this rule requires that to  
10 be produced.

11 I mean, Mr. Gage, do you have case law that says that a  
12 third party must produce the metadata along with whatever  
13 the document is?

14 MR. GAGE: Well, Your Honor, you know, again, if  
15 we go back to the nature of the request, what we're trying  
16 to do is recover essentially documents that, in a sense, are  
17 in our custody or they're in our control. They're our  
18 former consultants' work product.

19 And I'm sure the plaintiffs would probably take the  
20 position that we have, we have control over that in another  
21 context. It just happens to be here it's the plaintiffs'  
22 experts.

23 So, I think we have to keep that in mind. It's not  
24 like some poor innocent third party who, you know, is just  
25 incidentally wrapped up in the litigation. These are the

1 plaintiffs' experts who also happen to be our prior  
2 consultants.

3 And, Your Honor, if I may, Gary and I were talking --  
4 Mr. Rubin and I were talking this morning about the  
5 interplay between Rule 34 and Rule 45.

6 Gary, if you don't mind, if you could give the Judge  
7 your thoughts on that.

8 MR. RUBIN: And, and, Your Honor, it's exactly the  
9 point you just made. The documents need to be produced in  
10 the, as they're kept in the ordinary course of business.  
11 And, as Your Honor said, in the ordinary course of business,  
12 documents are maintained with, with their metadata.

13 The metadata is an integral part of what's called the,  
14 the native file, the file that exists, and is really -- you  
15 know, when you think about it, it's really nothing more than  
16 a series of electrons on, on magnetic tape. That's really  
17 all the file is.

18 So, what does that include? It includes something that  
19 can be by computer turned into language that we could read.  
20 But then it also includes the data about the data, the data  
21 that tells the computer this is a Word file, this is a PDF  
22 file. When you open this -- when, when the user clicks  
23 this, open, open PDF or, or open Word.

24 And, Your Honor, as for case law, I don't have any, and  
25 I apologize for not being prepared, on the tip of my tongue.



1 But I do believe that it is becoming more and more  
2 understood in the ESI cases that metadata are to be  
3 considered part of the, part of how a document is stored in  
4 the ordinary course of business, particularly where one of  
5 the parties requests it and, in this case, both parties are  
6 requesting it of the other party.

7 MR. GAGE: And, Your Honor, if I could -- this is  
8 William Gage -- just address a couple of points that Mr.  
9 Anderson made.

10 As Your Honor has already ruled, and, and I think as  
11 Mr. Rubin kind of followed up on, if, if there's a concern  
12 or a distrust in our vendor or our, you know, data  
13 collection method, then we're, we're perfectly comfortable  
14 with some other method of doing it, using some other company  
15 that we don't even engage or talk to and we're not, there's  
16 not, there's no way we can spy on them. I mean, that's not  
17 the intent is to spy on anybody. We just want to preserve  
18 the data.

19 It could become very important, Your Honor, as to, you  
20 know, what these doctors were telling Ethicon at, at what  
21 particular points along the way. Those could be critical  
22 moments in the relationship between Ethicon and these  
23 doctors. We have a very keen interest in finding these  
24 documents and then making sure that, you know, if we have to  
25 look at the metadata, it's been preserved.

1           So, I mean, we're fine with -- I mean, we, frankly,  
2           just offered it up as an accommodation because it's an easy  
3           way to do it. But if they're worried about it being spyware  
4           or whatever, absolutely, they can do it in a -- or we would  
5           ask that it be done using a vendor of their choice. We're  
6           not even physically in the room or touching the stuff.

7           THE COURT: Well, what I'd like, what I'd like to  
8           see is some case law that talks about whether electronically  
9           stored information under Rule 45 includes metadata. That  
10          would be the first thing that I would like to see.

11          The other issue, I think, that bothers me a little bit  
12          is we have -- I don't have any idea sitting here how  
13          burdensome this is going to be, how expensive, how  
14          time-consuming. I get the impression that perhaps there's  
15          not a lot of documents, so maybe it won't be a huge deal.  
16          But I feel uncomfortable making decisions about what Dr.  
17          Klinge and Dr. Klosterhalfen have to do without them really  
18          having any input in this decision-making.

19          I don't know anything about German law. I don't know  
20          what they would be able to do and not be able to do. And,  
21          so, I just don't think there's enough information in front  
22          of me today to figure out, first of all, how this could be  
23          done, how burdensome and expensive it would be, and whether  
24          the law even requires that that be produced by a third party  
25          in their position.

1 I understand your arguments, Mr. Gage, that these are  
2 former consultants and they've flipped on you. And, so,  
3 they're a little bit different than your average, completely  
4 unrelated, third-party deponent or, or witness. But I, I  
5 still have some concerns that we've got to take into  
6 consideration the burden on these doctors to produce this  
7 information, and also the benefits that might be gleaned  
8 from that information.

9 I mean, if these are contracts that you had with these  
10 physicians, I can't imagine why it would be all that  
11 important to have the metadata. I mean, maybe it is. I'm  
12 not seeing it sitting here.

13 But, you know, I think, I think I need more information  
14 on this particular topic. I need to know what options there  
15 would be for these doctors, how long it might take, how  
16 burdensome it would be, how expensive it would be, and those  
17 sorts of things, and whether, and whether they're even  
18 required to produce that kind of information under Rule 45.

19 MR. GAGE: All right. Your Honor, let me, let me  
20 suggest this. It, it may be that we have to do it in a, in  
21 a two-step process. And, Your Honor, if I may, I would ask,  
22 I would ask Mr. Rubin to basically keep me from putting my  
23 foot in my mouth. If I say something wrong, I would ask,  
24 Your Honor, that he speak up and, and fix me on this because  
25 he's kind of the expert here.

1 But, you know, we, we've also got the depositions that we've  
2 got to deal with. And it may be that the best approach is  
3 for -- Mr. Anderson said earlier today that -- when we were,  
4 we were talking about some of these issues that Drs. Klinge  
5 and Klosterhalfen, or at least maybe Dr. Klinge, had already  
6 gathered some materials but had not yet produced it to Mr.  
7 Anderson.

8 It may be that the next step is for, is for the experts  
9 to produce whatever they've got in whatever format they've  
10 got so that at least we can get whatever they have. And  
11 then we can brief the issue of getting the metadata, you  
12 know, while we're at least getting the paper documents.

13 And, Your Honor, if I may, I just need to, I need to  
14 ask Mr. Rubin, is there -- does that mess up, does that mess  
15 anything up by even asking for that?

16 THE COURT: You mean if they just print them out?

17 MR. GAGE: Correct.

18 MR. RUBIN: Right.

19 THE COURT: So, it shouldn't, should it?

20 MR. AYLSTOCK: That's my understanding, Your  
21 Honor. This is Bryan Aylstock. I'm no ESI expert but, you  
22 know, we, we certainly don't want to, you know, have any  
23 claims of spoliation. And we're willing to do it. We're  
24 willing to do exactly what Mr. Gage said. We'd ask for it  
25 to be reciprocal, that they also do it within the next ten

1 days so we can do this once and for all. But we're willing  
2 to do that.

3 THE COURT: So, --

4 MR. GAGE: Gary, can you comment?

5 THE COURT: Yeah. What happened to Mr. Rubin?

6 MR. RUBIN: Sorry. I was on mute. I apologize.  
7 This is Gary Rubin.

8 Accessing the documents does change the date on which  
9 the document was last accessed. And, so, printing it would.

10 However, having said that, what I'm using in my own  
11 mind in terms of gauging the reasonableness of what we're  
12 talking about is the ESI protocol.

13 I recognize plaintiffs' position that it doesn't apply  
14 to the doctors. But why don't we just agree, then, that if  
15 it's in the ESI protocol or if it's not, that will be our,  
16 my definition of what's reasonable.

17 I think, William, our position is, then, printing will  
18 be fine because it would not alter a type of metadata that,  
19 that is called for in the ESI protocol. And I'll let that  
20 be our rule of reasonableness.

21 THE COURT: All right. Well, then, so, we'll have  
22 the doctors print out responsive information.

23 Now, let's talk about the exchange and whether that  
24 should be simultaneous and how many days to do that.

25 MR. ANDERSON: Yes, Your Honor. This is Ben

1 Anderson. May I address that?

2 THE COURT: Yes.

3 MR. ANDERSON: One of the issues that we've had  
4 is, as you recall, we had requested -- and I'm not, I'm not  
5 trying to agitate Your Honor by saying things that have been  
6 requested for a long time. But I just want to historically  
7 indicate that prior to the trial in New Jersey, we had asked  
8 defense counsel for Ethicon for all of the Klinge and  
9 Klosterhalfen documents, which was approximately November of  
10 2012.

11 So, this issue has arisen again. And a couple of weeks  
12 ago, it was reported to Your Honor by Mr. Gage that they had  
13 found a -- they had dispatched a team who was over in  
14 Germany and they had found 50, at least 50, according to the  
15 transcript, evidence of 50 reports on explants by  
16 Dr. Klosterhalfen.

17 As William indicated, we were talking earlier in the  
18 day, and he told me that now they have four. And, so, I  
19 asked what the difference -- why we lost 46 in the last week  
20 and a half. And I wasn't being flippant about that. I  
21 really wanted to understand it.

22 And, so, our concern is that -- or what we, what we'd  
23 like to address is whatever this team that was dispatched a  
24 few weeks ago to Germany has come up with, including these  
25 50 reports, and any other documents that they have found or

1 that they believe are relevant to Drs. Klinge and  
2 Klosterhalfen, we would ask that they be produced to us in  
3 ten days, and anything that Dr. Klosterhalfen and Dr. Klinge  
4 have be produced -- and we can do it either on a disk or in  
5 hard paper format -- and they be produced both to Ethicon  
6 and to us within ten days as well.

7 THE COURT: Mr. Gage, why can't that be done?

8 MR. GAGE: Your Honor, let me first address --  
9 well, let me first address the 50 to seven because I do need  
10 to clarify something there.

11 At the September 30 conference what I told the Court  
12 was that, that we had somebody over in Germany talking to a  
13 company employee named Anke, A-n-k-e, Winter. And she was  
14 the individual that we had a lead on. And she was out on  
15 vacation. And, so, we were trying to meet with her when she  
16 got back.

17 And based on that interview with Anke Winter, I  
18 reported to the Court that they believed that -- this is a  
19 quote. They -- my quoting myself from the transcript.  
20 "They believe that over the years Dr. Klosterhalfen may have  
21 provided about 50 such reports following his review of mesh  
22 explants."

23 Well, that didn't -- that number didn't really stick in  
24 my mind much. And then a couple of days ago, I get an  
25 e-mail from some of our document people and I say, "What's

1 the update on producing those documents?"

2 And they say to me that they didn't locate any  
3 reference, any references to explants and Dr. Klosterhalfen  
4 within the pelvic mesh complaint files. And then we  
5 received a list, and there were seven that involved  
6 Physiomesh and PROCEED.

7 And, Your Honor, Physiomesh is a hernia -- it's mostly  
8 a hernia product. It's a partially absorbable product  
9 intended for abdominal hernia repair. And then also for  
10 PROCEED Ventral Patch. And PROCEED is the name of another  
11 Ethicon hernia product.

12 And, and I was told by the documents team that that  
13 explains why we did not locate these things in the pelvic  
14 mesh complaint files because apparently the reports we had  
15 were from the hernia files.

16 Now, so, then I reported that this morning to Ben. I  
17 said, "Ben, it looks like we've got seven." And Ben said,  
18 "Wait a minute. You said there were 50." And I said, "When  
19 did I say there were 50?" He said, "You told the Judge that  
20 on the phone."

21 So, I went back and pulled the transcript and I said,  
22 "About 50." So, I e-mailed my document people and I said,  
23 "Why did -- where did I come up with the notion that it was  
24 50 and now you-all are telling me seven?"

25 And, Your Honor, the deal was that when Ms. Winter was



1 first interviewed, the question that was posed to her was,  
2 "How many of these reports are there? Are there thousands  
3 of them? Are there hundreds of them?" And her answer to  
4 our documents people was, "Oh, no, much less, maybe 50."

5 So, at the time that, that I seized onto the 50 number,  
6 it was, it was her, it was her responding to kind of  
7 speculation about how many reports were we talking about, a  
8 huge number, or were we talking about a small number? So,  
9 she threw out the number 50 and that's what I reported to  
10 the Court.

11 What happened was -- what happened after that is then  
12 once she started helping us to drill down and find the  
13 reports, it turns out they can only find seven. And they're  
14 both regarding hernia products.

15 So, that -- I just wanted Your Honor to understand -- I  
16 know that's fairly laborious, but I wanted Your Honor to  
17 understand how I had those two different numbers.

18 THE COURT: All right. Well, if you have, if you  
19 have a handful of explant reports, what other documents do  
20 you have that you would need to produce to the plaintiffs  
21 from Klinge and Klosterhalfen?

22 MR. GAGE: Your Honor, --

23 THE COURT: What other types of documents?

24 MR. GAGE: Right. In, in connection with, you  
25 know, the hernia mesh stuff that we're -- the hernia mesh

1 documents that we're looking for, we came across some  
2 additional ex-US custodians that reference Dr. Klinge and  
3 Klosterhalfen in connection with the various Ethicon mesh  
4 products.

5 And, so, those -- that data is being shipped to us to  
6 one through -- you know, the way that it works, Your Honor,  
7 is the first step is -- I mean, essentially, it's not like  
8 physical pieces of paper from what I understand. It is --  
9 as Gary was saying earlier, it's like electrons on a  
10 magnetic tape.

11 We've got to load them into a computer. We have to  
12 search through that, both using English and German language  
13 terms because apparently when you're looking at the data  
14 from these people overseas, you can't just run English  
15 searches. You've got to run English and German searches.

16 Then that then captures the documents that contain, you  
17 know, the search terms that are in the ESI protocol, or part  
18 of the protocol that we use to search for documents.

19 Then those are loaded into a review tool. And the data  
20 is then sent to a vendor to be converted into an image  
21 that's kind of recognizable like a document, you know,  
22 something that you could actually -- it turns into an image  
23 there. So, it -- because it's not, it's not a physical  
24 piece of paper. It's just data.

25 I asked our people, our documents people this morning,

1 I said, "Look, I really want to get this stuff produced well  
2 in advance of this depo." And they said they would check on  
3 that and get me their absolute best. And I said, "Look,  
4 I've got to have it. We've got to get it done before this  
5 depo."

6 And, so, they're checking on that. I don't have an  
7 answer for Your Honor as to specifically how long it would  
8 take. But I can tell Your Honor it is clearly my intent and  
9 in our best interest to get this done well in advance of the  
10 depo because otherwise we're going to run into, you know,  
11 we're going to run into problems.

12 THE COURT: When is -- when are these -- when are  
13 the depositions scheduled?

14 MR. AYLSTOCK: The deposition of Professor  
15 Klosterhalfen is Sunday, November 10. The deposition of Dr.  
16 Klinge is the following Thursday and Friday, November 14th  
17 and 15th, 15th if necessary if they need more time.

18 THE COURT: Well, that doesn't give you a lot of  
19 time, Mr. Gage.

20 MR. GAGE: I know, and I'm concerned about it. In  
21 fact, we were, we were -- there was some discussion this  
22 morning, Your Honor, about is there any way that we can dig  
23 through these files and exclude everything else so that  
24 we're just focusing on the Klinge/Klosterhalfen stuff.

25 So -- and they said they would check on that. So, you

1 know, Judge, it will probably be -- I am hopeful tomorrow I  
2 should have some more, you know, information.

3 And, Judge, I mean, again, I'm not an ESI expert, but  
4 apparently this stuff -- I mean, it just takes time, you  
5 know. It's pretty tough to push it through a system.

6 But, nonetheless, this is clearly my highest priority  
7 in terms of document production. So, if I could get with my  
8 team, you know, and hopefully come up with something that we  
9 can put together tomorrow that, that satisfies the timing  
10 concerns.

11 MR. AYLSTOCK: Your Honor, --

12 THE COURT: Yes, go ahead, Mr. Aylstock.

13 MR. AYLSTOCK: I'm sorry, Judge. I didn't mean to  
14 interrupt. This is Bryan Aylstock.

15 My, my only comment is, you know, I understand it takes  
16 time which is why we requested it back in July of last year.  
17 And my fear is if we don't have an order, you know, we're  
18 not going to -- it's not going to happen. We all understand  
19 what an order means. And, and sometimes that helps clients  
20 do what they need to do.

21 THE COURT: Well, here's what I -- here's what I'd  
22 like you to do, both of you.

23 First of all, Mr. Gage, you need to find out ASAP what,  
24 what volume of documents we're talking about and how long  
25 it's going to take to get these processed. And that will

1 then determine how much time you're going to have, you're  
2 going to have to get them produced because, you know, the  
3 more documents there are, the sooner they're going to need  
4 them.

5 And we're not talking about a whole lot of time. We're  
6 talking about less than a month at this point. So, you  
7 know, 45 days is ridiculous, of course. I don't know if ten  
8 days is doable. Maybe there's something in between there.

9 And while you're at it, why don't you both look for  
10 cases that talk about Rule 45 and metadata. And you don't  
11 have to do a brief at this point. If you find a case that  
12 you think is relevant, then just e-mail the case cite to  
13 Laura and I'll, I'll start looking that over so that we can  
14 speed up that aspect of it too because, you know, if we find  
15 out that that's not really part of what Rule 45 envisions,  
16 then we don't have to worry anymore about that and you can  
17 go forward with your depositions and not have to worry about  
18 the metadata. So, --

19 MR. AYLSTOCK: Yes, Your Honor.

20 MR. GAGE: That sounds good.

21 THE COURT: Now, today is Tuesday. So, by  
22 Thursday at noon, Mr. Gage, I want the answers to those  
23 questions.

24 MR. GAGE: Yes, Your Honor.

25 THE COURT: And then, of course, I assume you'll

1 share those immediately even if it's before Thursday at  
2 noon. But you'll share that information with the  
3 plaintiffs' lawyers. And then you, you can both e-mail me  
4 your suggestions on what the time frame ought to be.

5 But I, you know, I think we've got to be realistic  
6 here. There's not a lot of time. So, you're going to have  
7 to really crank these things out, Mr. Gage.

8 MR. GAGE: Understood, Your Honor.

9 THE COURT: These, this Klosterhalfen stuff, I  
10 mean, I've just been hearing about this now for six months  
11 it seems like. And it doesn't seem like we're a whole lot  
12 closer to getting anything finished with him. I understand  
13 he's a very important witness, he and Klinge. But still  
14 we've got to move on these things.

15 All right. So, let's, let's do that on this issue.

16 MR. AYLSTOCK: Thank you, Your Honor.

17 THE COURT: Anything --

18 MR. THOMAS: Your Honor, this is David Thomas.  
19 I'd like to address one more issue with Klinge and  
20 Klosterhalfen if I may.

21 THE COURT: Certainly.

22 MR. THOMAS: I'm the one that's going to make the  
23 trip to take the depositions of these folks. Plaintiffs  
24 have agreed to make Dr. Klinge available for two days if  
25 necessary in order to do his fact deposition and his expert

1 deposition. However, they've only offered Dr. Klosterhalfen  
2 for a single day.

3 I thought we had this resolved six weeks ago when we  
4 discussed with them before about having a fact witness  
5 before and an expert deposition the second day. Now they,  
6 they suggest that we can do them both in a single day, which  
7 would be Sunday, November the 10th.

8 Dr. Klosterhalfen, Your Honor, as you probably well  
9 know by now, was a consultant for Ethicon for about 13  
10 years. Mr. Aylstock described him as one of the foremost  
11 experts in the world on mesh, as far as they're concerned, a  
12 very prolific author on the subject matter of the  
13 litigation.

14 And we received last night an expert report from Dr.  
15 Klinge which is 89 pages long. And while I haven't had a  
16 chance to read it yet, he relies upon studies where he works  
17 with Dr. Klosterhalfen in support of his opinions.

18 Your Honor, it's just critical that we have a full day  
19 to explore the factual relationship between  
20 Dr. Klosterhalfen and Ethicon over that 13-year period, and  
21 then have a second day to explore his expert witness  
22 opinions which are contained in a 26(a)(2)(C) expert  
23 disclosure we also received last night.

24 I think the rules contemplate that we get a full day  
25 for his expert deposition. The Court has already recognized

1 the need of a factual deposition because of this peculiar  
2 relationship with Ethicon. I just ask the Court to require  
3 the plaintiffs to make Dr. Klosterhalfen available for two  
4 days.

5 And, of course, if I get it finished in one, I'll be  
6 thrilled. I'll be able to spend some time in Germany. But  
7 if I need two, I'd like to have two instead of coming back  
8 after it's over and asking the Court for another day and  
9 having to go over there and get a second day.

10 THE COURT: You know, I'm a little astonished that  
11 this is even an issue. I cannot understand which  
12 plaintiffs' lawyer would have said that the defendant can  
13 only have one day to take this deposition.

14 I mean, we have talked about this sort of thing so many  
15 times. And how many times have we agreed that a fact  
16 deposition is different than an expert deposition or a Rule  
17 30(b)(6) deposition? I don't understand. I mean, who said  
18 they could only have one day?

19 MR. ANDERSON: Your Honor, this is Ben Anderson.  
20 And it's a little bit different than Mr. Thomas described.

21 A few weeks ago we talked about this. And I indicated  
22 that he was a non-retained expert and he was going to submit  
23 an (a)(2)(C) report, and that he had one day that he had  
24 available which was November 10th.

25 And they said, "We want to do all of the depositions at



1 once in Germany." And I said, "Well, given that he's not a  
2 retained expert, he's not going to have a 95-page report  
3 like Klinge. He's going to have a very short report of  
4 opinions. And I believe he should be able to cover the  
5 facts and the experts in one day. He's got one day."

6 And, so, we set it up for one day, and we talked about  
7 this a couple of weeks ago. And then Mr. Thomas raised it  
8 with me a few days ago, and I said, "I haven't talked to him  
9 about an extra day."

10 And, so, I am more than willing to talk to him about  
11 another day. The problem is they wanted to get him done in  
12 one week. And, so, we set Klosterhalfen on a Sunday. We  
13 set Muehl on a, on a Monday. And then Klinge was available  
14 on the Thursday and the Friday.

15 And one of the things that they had sent to me and  
16 said, "Well, perhaps if he can't do it on that day, we might  
17 be able to do it while we're over there."

18 And, so, if there's a chance to do that, quote/unquote,  
19 while we're over there, and it can be done in between or it  
20 can be done before, based upon his schedule, then we're more  
21 than willing to try to do that. But it's a little bit  
22 different than the way it was framed, Your Honor.

23 And, so, I'm more than happy to try to do that. But he  
24 could not do anything during the week because of his  
25 schedule. So, we planned it for a weekend.

1           And, so, I am happy to try to see if we can do it while  
2 we're over there. The problem was they were restricting us  
3 to one week. They said, "We've got to get this done in one  
4 week." And that could not be possible.

5           So, I'm happy to try to see if there's a day after  
6 Klinge or -- yeah, it would have to be after Dr. Klinge and  
7 probably on a weekend if we can get him that following  
8 weekend.

9           MR. AYLSTOCK: Your Honor, --

10           THE COURT: Well, you need to make it so. I have  
11 bent over backwards giving you the time you need to take  
12 your depositions. And I am astonished that you would expect  
13 them to take this man's deposition in one day. That's just  
14 not even reasonable.

15           I also think it's very reasonable of Ethicon to want to  
16 do the German depositions at the same time since they have  
17 to go to Germany to do them.

18           So, this is -- this whole subject -- I can't even  
19 understand why this is a subject that has to be brought up  
20 to the Court. I mean, anybody with any common sense would  
21 know you can't limit that deposition to one day, and that  
22 they should be done close together in time while they're  
23 over there.

24           MR. ANDERSON: And we're trying to do just that,  
25 Your Honor.

1           THE COURT: Well, let's, let's do our very, very  
2 best because I just -- that just is really astonishing to me  
3 that it's even a subject. So, I think you need to do what  
4 you can with Dr. Klosterhalfen to get that worked out.

5           MR. ANDERSON: Part of the problem is, Your Honor,  
6 that I do not have direct contact with him. And, as you  
7 know, Henry Garrard from the litigation -- and Henry has  
8 been working with him for a number of years. And, so, I  
9 have -- I will go back to Mr. Garrard and we will see if  
10 there is something we can do. I do not have direct contact  
11 with him. And, so, apologies to this Court, and I will do  
12 whatever I can to make sure that this happens.

13           THE COURT: All right, fine. Is there anything  
14 else on Klosterhalfen or Klinge?

15           (No Response)

16           THE COURT: All right. Is there anything else?  
17 We've got about six minutes left today that we can talk  
18 about some other topic. Is there anything that needs to be  
19 covered today?

20           MR. GAGE: Judge, I've got just a couple of quick  
21 ones. And they're not -- these are not going to be  
22 contentious or big problems, but I do need to raise them.

23           THE COURT: All right.

24           MR. GAGE: This is William Gage.

25           Your Honor, -- and, and I -- this came to my attention

1 after the call with Bryan this morning. And I would have  
2 raised it with Bryan on the call, but it just came to my  
3 attention thereafter and it's not a big deal.

4 Judge, the Federal Rules of Civil Procedure technically  
5 require the document requests to non-parties, including  
6 experts, be made through subpoenas, *subpoena duces tecum*.

7 But in the interest of time and efficiency, Ethicon is  
8 proposing to plaintiffs that we would agree that document  
9 requests of experts in the *Lewis*, which is the first MDL  
10 case, and the other MDL cases can be made via the notices of  
11 depositions rather than through formal subpoenas. And,  
12 obviously, we would reciprocate. Both sides would do that.

13 And we're -- because we're about to have to issue  
14 notices or subpoenas and I wanted to just see if that was  
15 okay with, with Bryan and the plaintiffs.

16 THE COURT: Mr. Aylstock.

17 UNIDENTIFIED SPEAKER: I'm sorry, Your Honor. Mr.  
18 Aylstock dropped off. I'm trying to get him back on the  
19 line. Mr. Cartmell, if he's prepared to talk about it, he  
20 can do it until we get him back.

21 MR. CARTMELL: I'm really -- this is Tom Cartmell,  
22 Your Honor. I guess I'm really not prepared. But I  
23 would -- I'm just thinking about it as I heard Mr. Gage talk  
24 about it.

25 And, and my only concern would be that, you know, these

1 experts, we're not representing them. We have retained  
2 them. I'm not exactly sure what these document requests are  
3 going to be.

4 But to the extent that they are taxes, you know, and  
5 things like that, I guess I'm a little hesitant without  
6 knowing what the requests are going to be to agree to that  
7 or be able to agree that these people that we don't  
8 necessarily, obviously, represent have to turn over a bunch  
9 of stuff that we don't know what it would be and whether  
10 it's personal nature or whether they have any rights to say  
11 "no."

12 THE COURT: Mr. Gage, were you talking again about  
13 Klinge and Klosterhalfen or are you just talking about other  
14 witnesses?

15 MR. GAGE: I just was referring to experts in  
16 general, Judge.

17 THE COURT: Experts in general. Because I --

18 MR. GAGE: Yes.

19 THE COURT: -- thought I understood you already  
20 served a subpoena on Klosterhalfen and Klinge.

21 MR. GAGE: That's correct, Your Honor. That was  
22 in connection with like their fact depo because at the time,  
23 they hadn't been designated as experts.

24 And what happened was we got the expert witness  
25 designations last night from the plaintiffs. And, I mean,

1 to be perfectly honest with you, Judge, you know, it's just  
2 kind of a surface level thought that we just had here. We  
3 just said, hey, it would be a whole lot easier for both  
4 sides to agree to do this.

5 THE COURT: You're just agreeing, you're just  
6 agreeing -- what, what you want to agree to is that the  
7 document can be served along with the notice and doesn't  
8 have to be served as a subpoena. But you're not suggesting  
9 that they have to -- they can have no objections to the  
10 documents.

11 MR. GAGE: Oh, of course not, Judge. All I'm  
12 saying is the parties would agree that we don't have to go  
13 physically get a third party issue subpoenaed and then  
14 physically delivered to their expert witness that, to get,  
15 you know, the documents that you normally request with  
16 regard to an expert witness.

17 But, instead, we would just include the document  
18 requests in the -- either as an attachment to the depo  
19 notice or in the body of the depo notice. And then both  
20 sides would fully preserve all objections, including the  
21 expert would preserve all objections. The, the change in  
22 service would affect nothing other than the fact that you  
23 would physically serve a subpoena.

24 MR. CARTMELL: I'm sorry. This is Tom. That was  
25 dumb. I apologize. We have no problem with that.

1 MR. GAGE: Okay.

2 THE COURT: All right.

3 MR. GAGE: And then, Judge, the last thing I had  
4 which is kind of ending on a good note is -- because I do  
5 want you to know that although you always catch us at our  
6 bad moment, we do, we do have things where we can agree and  
7 we do make progress. And there was one quick thing I wanted  
8 to report on.

9 The -- we've been kind of going back and forth on some  
10 de-designation of confidential documents. You know, we  
11 designate a lot of stuff confidential, and sometimes the  
12 plaintiffs ask us to de-designate. And lately there's been  
13 a fair amount of e-mail traffic on that. And, so, it kind  
14 of got a lot, to be a lot of e-mail traffic.

15 And, so, what we had basically agreed to was a process  
16 to address confidentiality challenges on a rolling basis so  
17 that, you know, for the documents where the plaintiffs had  
18 specifically identified, we're going to give the plaintiffs  
19 kind of a "yes/no" answer on whether we're going to agree to  
20 de-designate during some weekly calls that we're going to  
21 have.

22 And then in cases where, for example, the plaintiffs  
23 may challenge the entirety of the depo testimony or exhibits  
24 without further specificity, the plaintiffs are going to  
25 give us the testimony and the documents that they're

1 specifically challenging. And then we're going to give them  
2 a "yes/no" answer that will be scheduled no later than two  
3 weeks from the date. And then we'll continue to respond as  
4 each new request comes in on a rolling basis like that.

5 So, I, I was pleased to see that we got that knocked  
6 out, and I just wanted you to know that we were able to  
7 knock it out.

8 THE COURT: Well, --

9 MS. BAGGETT: Well, Your Honor, this is Renee  
10 Baggett. I was in on the call regarding the confidentiality  
11 designations. And, and one thing I did want to point out  
12 was that we did ask both the defense counsel, specifically  
13 the person in charge of designating them -- they're in a  
14 better position, for the most part, to know whether or not  
15 they're over-designating. And we've asked them to have her  
16 go back also in addition to us going through them and see  
17 where she can remove some of them without us having to  
18 specifically request it.

19 THE COURT: Well, and I do want to remind you all  
20 that Judge Goodwin, as I've, as I've stated before, finds  
21 very few things to warrant protection. So, I think that  
22 probably what's going to happen is many of the things that  
23 you may still think should be designated as confidential  
24 he's going to say are not confidential.

25 With that in mind, you probably ought to look at the



1 documents. And if there's something that is really not  
2 clearly confidential, go ahead and de-designate them instead  
3 of waiting for the plaintiffs to point it out.

4 But I do think it's great that you've come up with this  
5 process and that you're doing this ahead of, of getting to  
6 the point of the schedule and whatnot. I think that's very,  
7 very good. So, I'm proud of you all.

8 You know, I, I don't -- I know that you guys work very  
9 hard to work a lot of these things out. And, so, all that I  
10 ever see are the things that you can't agree on. I'm sure  
11 there's many, many more things you do agree on. And it  
12 seems like things are moving forward pretty well. But it  
13 does help, I think, to have these conversations every now  
14 and then.

15 MR. GAGE: It does.

16 THE COURT: So, that brings us to a close today  
17 unless there's something that really can't wait for two  
18 weeks. And I guess it's a little less than two weeks. It  
19 would be a week from Friday when we would next talk.

20 MR. AYLSTOCK: Right.

21 MR. GAGE: That's right, Judge.

22 THE COURT: If there isn't anything else, then I  
23 will just look by Thursday before noon to see what you can  
24 give me on the metadata and on the, the amount of time and  
25 the volume of documents that Ethicon will be producing in

1 relation to Klosterhalfen and Klinge. All right.

2 MR. GAGE: Sounds good, Your Honor. Thank you.

3 MR. AYLSTOCK: Thank you, Your Honor.

4 THE COURT: Thank you all. Bye-bye.

5 (Proceedings concluded at 4:00 p.m.)

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1 I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

6  
7  
8 s\Lisa A. Cook

October 16, 2013

9 Reporter

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